

Penalty Policy Subcommittee	
Issue Priority.	1
Key Issue	<p><u>Penalty Policy simplification:</u></p> <p>A) Can the current Penalty Policy be simplified, and if so, how and what are the costs and benefits of the simplification?</p> <p>B) Should the penalty calculation exclude all self-reported violations or deviations, as well as the notices of violation/enforcement covered in the current case? Should the penalty calculation include all notices of enforcement not preceded by a notice of a violation?</p> <p>C) Should the Penalty Policy continue to take into account the compliance history of the respondent and the compliance history of the site?</p> <p>D) Should the policy for penalty calculation adjustments be revised to account for investigations?</p> <p>E) Should notices of violation issued by another entity or an agency contractor be considered in the penalty policy?</p> <p><u>Basis:</u> Commissioner Input, Public Comment and Steering Committee Input</p>
Other Subcommittees Reviewing Issue	Compliance History Classification; Compliance History Use; Enforcement Initiation/Investigation Prioritization/NOV Policy
Recommendation	<p>In response to Key Issue A), the subcommittee determined that there are ways to simplify the penalty policy in ways that will not be costly but instead could reduce the burden on staff resources, as described below. Key Issues B) through E) all question the use of specific components of the current compliance history formula. In response it is recommended that TCEQ eliminate double-counting in the Penalty Policy by eliminating the Compliance History Worksheet from page 2 of the Penalty Calculation Worksheet. Only a penalty adjustment based on the overall compliance history classification of the respondent would remain. This partially addresses Sub Issues B, C, D and E.</p> <p>Further simplify the Penalty Policy by eliminating the potential and programmatic penalty matrices. Replace the matrices with common categories for violations across all major program areas and standardizing the penalties for the most common violations. Utilize a list of common categories of violations in guidance to provide flexibility. The subcommittee addresses this alternative in Key Issue No. 7 regarding mandatory minimum penalties.</p> <p><u>Implications:</u></p> <ul style="list-style-type: none"> • Simplification can erode adjustments built in to address specific policy purposes, such as those for small business or small local governments.

	<p><u>Basis:</u> This is supported by public comments to only count factors once. Eliminating most of page 2 of the Penalty Calculation Worksheet will ensure an act or omission of a respondent is counted only once in the overall enforcement process.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Simplifying the Penalty Policy can be accomplished through the process of promulgating the Penalty Policy in rule and incorporating the policies and changes approved by the commissioners at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.

Penalty Policy Subcommittee	
Issue Priority.	2
Key Issue	<p><u>Recovering economic benefit through administrative penalties:</u></p> <p>Should all or part of the economic benefit resulting from noncompliance be included in the penalty before adjustment for other factors as justice may require? If so, what is an equitable method to calculate economic benefit?</p>
	<p><u>Basis:</u> Commissioner Input, Public Comment, Steering Committee Input, Staff Input and Review of Current Policy, State Auditor's Report.</p>
Other Subcommittees Reviewing Issue	

Recommendation	<p>Currently, the method used to develop economic benefit for delayed capital cost is:</p> <ul style="list-style-type: none"> • $EB = \text{Interest saved} + \text{Onetime cost}$ • $\text{Interest saved} = (\text{Item cost} / \text{Years of depreciation}) \times \text{Years Delayed} \times \text{Annual percentage interest rate}$ • $\text{Onetime cost} = (\text{Item cost} / \text{Years of depreciation}) \times \text{Years delayed}$ • EB is an upward penalty adjustment of the base penalty only when the calculated benefit exceeds \$15,000 <p>The following are recommendations regarding alternative ways to treat economic benefit in the Penalty Policy. Any combination can be selected:</p> <p><u>Enhanced consideration of economic benefit</u></p> <ul style="list-style-type: none"> • taking into account any cost of compliance in the calculation of economic benefit received, which in some cases dwarfs any penalty amount • recover economic benefit of noncompliance rather than a percentage of base penalty • remove the discussion of base penalty enhancement • re-word the penalty policy to define the types of benefit that will be evaluated and require the benefit to be an add-on to the penalty amount up to the statutory maximum • recover all or some part of the economic benefit (recovering “all” the economic benefit means recovering all that is permissible up to the statutory amount allowed for the penalty) <p><u>Eliminate thresholds</u></p> <ul style="list-style-type: none"> • remove the \$15,000 criteria related to when economic benefit applies to a case • recover economic benefit even if a penalty is mitigated due to inability to pay <p><u>Differentiate between size of a facility or magnitude of a violation</u></p> <ul style="list-style-type: none"> • add the discretion to look at profit and / or to use EPA’s BEN Model to calculate and estimate the economic benefit in complex and significant violations • recover all economic benefit only on cases with actual harm or egregious violations and recover something less than all economic benefit for other cases • recover economic benefit only when the respondent is determined to be a major facility as defined in the penalty policy • develop a separate economic benefit policy for local governments that may include factors such as the size, type of source being operated, major or minor source, etc. <p><u>Simplification</u></p> <ul style="list-style-type: none"> • eliminate the depreciation value which is a more difficult concept to apply in order to perform a simpler economic benefit calculation
	<p><u>Implications:</u></p> <ul style="list-style-type: none"> • higher rate of no-settlement due to the increase in penalty • more orders issued with payment plans (and potentially a higher percentage of cases with incomplete collections) • may be difficult to obtain financial information regarding how much economic benefit a respondent realized • may be resource intensive to determine economic benefit

	<p><u>Basis:</u> See attachment following Penalty Policy Issue 12. It compares economic benefit calculation in comparable states. The subcommittee considered the economic benefit policies of California, New York, New Jersey, Florida and the EPA. In general, the economic benefit analysis of other states is very similar to Texas, but the difference comes with what part of economic benefit should be collected. In some states all the benefit up to their statutory cap is collected according to state policy with some minor exceptions, but further review reveals that the policy is not consistently followed in the other states.</p> <p>Some public comments which also suggest that the agency should be collecting all of economic benefit.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • From the menu of choices or other sources, the commissioners would determine the appropriate policies regarding economic benefit. • Implementation can be accomplished through the process of promulgating the economic benefit policy in rule at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.
Other Alternatives	<p>Alternatives are presented in the main recommendation in a format much like a menu where any or all or a combination of alternatives can be chosen.</p>
Notes	<p>No data exists regarding how often economic benefit is actually applied in a case, but staff estimates probably in less than 10% of all cases because the economic benefit is either negotiated out of agreed orders or the amount does not exceed the \$15,000 minimum. In cases where economic benefit does exceed the \$15,000 minimum, the recovery is usually less than \$1,000 after deducting the \$15,000 minimum.</p>

Penalty Policy Subcommittee																
Issue Priority.	3															
Key Issue	<u>Penalty policy for small entities:</u> Should small business and small local governmental entities, as well as small nonprofit entities, be allowed a downward adjustment of a base penalty															
	<u>Basis:</u> Commissioner Input, Public Comment, Steering Committee Input, Staff Input and Review of Current Policy															
Other Subcommittees Reviewing Issue	Enforcement Initiation/Investigation Prioritization/NOV Policy															
Recommendation	Yes, it is recommended that TCEQ not create a completely separate Penalty Policy for small businesses and small local governments. However, it is recommended that a penalty adjustment be used as a component of the Penalty Policy to result in reduced penalties for small businesses and small local governments.															
	<p>However, a prohibition should exist so that a small business or small local government cannot receive a penalty reduction if they have caused actual major environmental harm or have a poor environmental record based on compliance history.</p> <p>Small businesses should be defined consistently with other subcommittees considering small business issues. It is recommended the definition include businesses with less than 100 total employees, independently owned and operated and generating annual revenues of less than \$1 million. Small local governments should be defined as either a city with less than 10,000 population or a county with less than 50,000.</p> <p>Recommend a penalty reduction component as follows:</p> <table> <tr> <td colspan="2"><u>Small Business:</u></td></tr> <tr> <td>Annual Gross Revenues \$1 - \$999,999</td><td>15%</td></tr> <tr> <td colspan="2"><u>Small Local Municipal Government:</u></td></tr> <tr> <td>Population 0 - 10,000</td><td>15%</td></tr> <tr> <td colspan="2"><u>Small Local County Government:</u></td></tr> <tr> <td>Population 0 - 50,000</td><td>15%</td></tr> <tr> <td colspan="2"><u>Other Small Local Government:</u></td></tr> <tr> <td>Located in a County with Population 0 - 50,000</td><td>15%</td></tr> </table> <p>Additionally, the implementation of this policy should include flexibility so that the Commission will have the discretion to adjust the 15% reduction either upward or downward based upon unique financial circumstances or the nature of the violation. For a small local government a penalty may be partially or completely deferred in exchange for a commitment to expend the money to address compliance issues.</p>	<u>Small Business:</u>		Annual Gross Revenues \$1 - \$999,999	15%	<u>Small Local Municipal Government:</u>		Population 0 - 10,000	15%	<u>Small Local County Government:</u>		Population 0 - 50,000	15%	<u>Other Small Local Government:</u>		Located in a County with Population 0 - 50,000
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	<p><u>Implications:</u></p> <ul style="list-style-type: none"> • penalty savings could be used for compliance costs • less repeat violations since poor compliance history may result in no penalty reduction • enforcement staff may need to review information provided by the respondent regarding annual revenues, population and local government wealth. <p><u>Basis:</u> Public comments generally support different penalties for small business, though the comments are less supportive of different penalties for small local governments.</p> <p>Counties and municipalities face unique constraints in complying with environmental requirements. For the following reasons, the subcommittee considered a larger penalty reduction for small local governments than for small businesses:</p> <ul style="list-style-type: none"> • public financing is typically more cumbersome than for private sector entities • municipal functions can trigger large environmental obligations, which may overwhelm county or municipal tax bases • some services provided by a county or municipality are essential and must often continue to operate (e.g. provision of water and sewer service).
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Implementation can be accomplished through the process of promulgating the small business and small local government policies in rule at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.

<p>Other Alternatives</p>	<p>TCEQ could consider including in the definition of small governmental entity an entity less wealthy than state averages as measured by either median household income or poverty levels (one of the two).</p> <p>TCEQ could consider reducing penalties further for less wealthy small local governments.</p> <p>The subcommittee considered but rejected a recommendation for small businesses including:</p> <ul style="list-style-type: none"> • emission limits – difficult to set for all media (but would weigh environmental impact) • limit to only “not-for-profit” entities – would exclude water supply corporations • exclude publicly held entities – not necessarily a measure of size or revenues
<p>Notes</p>	<p>In FY 2003, small business, small city, small county, or small public water systems accounted for 641 commission orders issued while larger entities accounted for 351 commission orders. Of the 641 commission orders issued against smaller entities, small business alone accounted for 531. Therefore, any change to policy relating to small business and small local governments will affect approximately 65% of all orders issued.</p> <p>Numerous definitions of small business can be found in federal statute, state statute and state rule, and include number of employees from less than 100 to less than 250, independent ownership and operational control, for profit status, maximum revenue threshold of \$1 million to \$3 million, whether it is dominant in its field and whether it is a major source. Small local governments are identified by virtually all sources by population, many using 10,000 for small cities and 50,000 for small counties.</p> <p>Small business and small local governments generally have smaller penalties, so any percentage of reduced penalties will not be as significant in dollar amounts as compared to larger entities. Even with smaller penalty amounts in terms of dollars, the deterrent effect on the smaller entity is on par with a much larger dollar amount for a larger entity.</p> <p>Texas population data shows that 87% or 1,270 cities are under 10,000 in population, 2/3 of which are less than 3,300 in population. 199 of the 254 counties in Texas, or 78% have less than 50,000 in population. Every TCEQ region except for DFW, Houston and Harlingen had over 60% of their counties listed as rural.</p>

Penalty Policy Subcommittee	
Issue Priority.	4
Key Issue	<u>Deterrence through penalties:</u> Are the penalties assessed effective in deterring violations?
	<u>Basis:</u> Commissioner Input, Public Comment, Staff Input and Review of Current Policy.
Other Subcommittees Reviewing Issue	
Recommendation	<p>The enforcement process and system as a whole, not solely the Penalty Policy, must be working properly in order to serve as a deterrent. If the objectives of the overall enforcement review are met, the deterrence benefit will be increased. For this reason, recommendations regarding the Penalty Policy will not in themselves wholly address the deterrence issue.</p> <p>The Penalty Policy can be strengthened to improve the deterrence factor in the following ways:</p> <ul style="list-style-type: none"> • Add language to the Penalty Policy expressly discussing deterrence as a goal of enforcement. Example language from New York’s penalty policy (pages 2-3 (emphasis added)): The primary purpose of the policy is to articulate the [Commission’s policies for assessing and collecting penalties in a manner that will assist [the Commission] in efficiently and fairly <u>detering and punishing</u> violations and to provide the public with an understanding of [Commission] policy in this area. <u>This policy is intended to send a message to regulated entities that [the Commission] has the will and capability to obtain penalties which are sufficiently high to deter violations by individuals, companies, and public agencies.</u>” <p>Example language from Florida’s penalty policy (pages 2-3): In assessing penalties, the Commission “will not only look at the statutory authorizations and requirements, but also at the following: does enforcement result in the elimination of any economic benefit gained by the violator as a result of the violation: and beyond that, <u>does enforcement provide enough of a financial disincentive to discourage future violations not only from the violator but from others contemplating similar activities?</u>” “<u>The use of penalties is an enforcement tool that should be used in any case in which it is determined that penalties are needed to ensure that the responsible party and others similarly situated are deterred from future non-compliance.</u>”</p>

	<p>Additionally, the following recommendations address deterrence:</p> <ul style="list-style-type: none"> • pursuant to Key Issue 7, assess mandatory minimum penalty for each occurrence of significant non-compliance • for repeat violators, eliminate downward adjustments of the base penalty for good faith efforts to comply, compliance history or any other factor • track enforcement data to measure the level of deterrence achieved from future enforcement program improvements, using measures such as percentages of repeat violators or changes in particular types of violations
	<p><u>Basis:</u> Deterrence of future violations is a long-recognized goal of penalty assessment. Texas Water Code § 7.053(3)(E) expressly provides that in considering the amount of a penalty the commission shall consider the amount necessary to deter future violations. The need for compliance incentives in the enforcement process must be balanced with the need for deterrence through the assessment of effective penalties.</p> <p>The assessed penalty did not deter future violations by the same entity for 17% of the regulated entities that were issued orders in FY 1999. Data provided by the Enforcement Division shows that there were 829 regulated entities with orders issued in FY 1999. Of these 829, 269 received either NOEs or NOV's in the subsequent period of 2000 to present. This represents a 32% rate of recidivist violations.</p> <p>Including only NOEs in the calculation may be a better measure of recidivism. Of the 829 regulated entities with orders issued in FY 1999, 142 received either NOEs in the subsequent period 2000 to present. This is a 17% rate of recidivist violations.</p> <p><i>* This evaluation is likely conservative since it doesn't include any data prior to FY 1999. It also doesn't consider that entities that received an initial violation after 1999 may have had a subsequent violation and therefore be a recidivist violator.</i></p> <p>In addition, the FY 2003 Enforcement Report indicates that "Of the 992 Orders issued [in FY 2003] regarding 964 regulated entities, 172 (17.8%) of the regulated entities had previous enforcement."</p> <p>The assessed penalty did not deter future violations by the same entity for 17% of the regulated entities that were issued orders in FY 1999. On the flip side, 83% of the entities with violations in FY 1999 did not have an NOE during the subsequent period FY 2000 to date in FY 2004.</p>

	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Including an express statement regarding the goal of deterrence can be accomplished during the process of promulgating the Penalty Policy in rule at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • In order to ensure the Penalty Policy is effective in deterring noncompliance, a detailed analysis should be included in the annual enforcement report describing factors to determine whether deterrence is achieved. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.
Notes	<p>Fraud deterrence hinges on the “perception of detection” according to Joseph Wells - founder of the Association of Certified Fraud Examiners. People who believe that they will be caught are less likely to offend. Furthermore, Wells indicates that many experts believe that punishment is of little value in deterring crime because the possibilities of being punished are too remote in the mind of the potential perpetrator. Wells give the illustration that when someone is about to do wrong, the first thing that comes to their mind is “will I get caught?” not “what is the punishment if I do get caught?” If they answer yes to the first question, they are not likely to commit the offense. According to this argument, the punishment is moot as a deterrent regardless of how severe it is. With this logic, to deter wrongdoing, an enforcement system should focus on increasing the perception and reality of catching wrongdoers rather than solely on the penalty.</p> <p>Elements of an effective enforcement system:</p> <ul style="list-style-type: none"> • strong proactive policies/laws and an awareness/education program • increased oversight, including analytical data reviews and surprise audits/inspections • adequate reporting programs - allow and encourage employees/citizens to report suspicious activity • consistently enforce policies/laws • after detection of wrongdoing, take all reasonable steps to appropriately respond to the offense and to prevent further similar offenses including punishment

Penalty Policy Subcommittee	
Issue Priority.	5
Key Issue	<u>Promulgation of Penalty Policy by rule:</u> Should the Penalty Policy be adopted as a rule in whole or in part, and supplemented with a single guidance document encompassing all internal guidance and internal memos?
	<u>Basis:</u> Public Comment
Other Subcommittees Reviewing Issue	
Recommendation	Promulgate Penalty Policy in rule, and supplement with guidance, maintaining enough flexibility for commissioner discretion. This recommendation is closely related to Key Issue No. 7 relating to mandatory minimum penalties and Key Issue No. 12 relating to joint and several liability.
	Benefits: <ul style="list-style-type: none"> • strength at a SOAH hearing on recommendation if Penalty Policy is in rule rather than policy • settles more non-contested cases because in following a rule, there is less room to negotiate • saves resources with less room to negotiate • more uniform recommendations and decisions • the rulemaking through the Administrative Procedures Act will provide a transparent, reasoned justification Cons: <ul style="list-style-type: none"> • inflexible • hard to change • takes discretion from ED and commissioners • very involved rulemaking which will take administrative resources
	<u>Basis:</u> When first developed the Penalty Policy was intended to function for a period of time and then be adopted in rulemaking with lessons learned from implementation. This was over 7 years ago.
	<u>Implementation Impacts:</u> <ul style="list-style-type: none"> • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required.
Other Alternatives	Do not promulgate penalty policy in rule, but rather only use it as a guide for settlement of agreed orders. For cases which are not settled, recommend the statutory maximum to the SOAH judge.

Notes	During the rulemaking process, special attention should be given to ensuring the definitions of “major” and “minor” sources in the Penalty Policy are consistent with those definitions in permitting requirements.
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Penalty Policy Subcommittee	
Issue Priority.	6
Key Issue	<u>Consideration of a respondent’s pollution control investment:</u> Should investment in pollution prevention technology be used as a factor in calculating penalties for violations or economic benefit while operating in noncompliant status?
	<u>Basis:</u> Steering Committee Input
Other Subcommittees Reviewing Issue	
Recommendation	Currently, no consideration is given to investment in pollution control equipment not mandatory under a regulatory requirement. The subcommittee does not recommend a change to current policy in regard to this issue.
	<u>Implications:</u> Consideration of investment adds complexity, and also may lead to double-dipping if an entity receives a favorable tax credit for pollution control equipment and potentially the generation of offset credits.
	<u>Implementation Impacts:</u> N/A
Other Alternatives	The commissioners can accomplish the same results by utilizing general authority to set a penalty based on as justice may require.
Notes	This issue involves implementing controls in addition to those required after an NOE is issued for a violation. This has actually been an issue 3 times in the last 10 years that staff is aware.

Penalty Policy Subcommittee															
Issue Priority.	7														
Key Issue	<u>Mandatory minimum penalty for each occurrence of significant noncompliance:</u> A) Should a mandatory minimum penalty be required for each occurrence of significant noncompliance? B) Should statutory administrative penalties be equalized across programs to provide for consistency, including lowering penalties for small entities? C) Does the penalty policy equitably account for and make a distinction between harm to the environment and a “paperwork” violation?														
	<u>Basis:</u> Commissioner Input, Public Comment, Steering Committee Input, Staff Input and Review of Current Policy														
Other Subcommittees Reviewing Issue	Enforcement Process														
Recommendation	Simplify the Penalty Policy by eliminating the “Potential Release” from the appropriate environmental / human health / property matrix, and calculate violations for “Potential Release” with common categories for violations across all major program areas, standardizing the penalties for the most common violations. Consistent with Key Issue No. 5 regarding a rulemaking for the Penalty Policy, utilize a list of common categories of violations in guidance to provide flexibility. The subcommittee references this recommendation in Key Issue No. 1 regarding simplification.														
	The subcommittee has provided a recommended list intended to serve as guidance (see attachment following this key issue table) for penalties related to common violations, and the subcommittee recommends changing the environmental / human health / property matrix as follows: <table><tr><td>Harm Level:</td><td>Major</td><td>Moderate</td><td>Minor</td></tr><tr><td>Respondent:</td><td>Major/Minor</td><td>Major/Minor</td><td>Major/Minor</td></tr><tr><td>Actual Release</td><td>100% / 75%</td><td>75% / 50%</td><td>50% / 20%</td></tr></table> <u>Pros:</u> <ul style="list-style-type: none">• shorter, consistent, easier for stakeholders not familiar with the agency to understand their penalty• the list promulgated in guidance can address Sub Issues A (significant noncompliance), B (equalized penalties) and C (harm to the environment) <u>Cons:</u> <ul style="list-style-type: none">• draconian, no flexibility, and changes precedence <u>Other:</u> <ul style="list-style-type: none">• affects 60% to 70% of all cases, and may significantly lower penalties				Harm Level:	Major	Moderate	Minor	Respondent:	Major/Minor	Major/Minor	Major/Minor	Actual Release	100% / 75%	75% / 50%
Harm Level:	Major	Moderate	Minor												
Respondent:	Major/Minor	Major/Minor	Major/Minor												
Actual Release	100% / 75%	75% / 50%	50% / 20%												

	<p><u>Basis:</u></p> <p>The answer to Sub Issue A is that current policy does require mandatory minimum penalties. However, the recommendations above further supports the concept of mandatory minimum penalties.</p> <p>The answers to Sub Issue B regarding equalized penalties and Sub Issue C regarding “paperwork” violations are both inherently “yes” in the recommendations made above.</p> <p>In raising the mandatory minimum penalties for significant noncompliance as an alternative recommendation above, deterrence is furthered and penalties are increased on larger violations with more impact.</p> <p>In developing the recommended guidance, staff researched the most common violations for major program areas and divided the violations into common categories and then assigned a standard penalty amount for each category as a percentage of the statutory limit for major and minor sources. Any documented violation falling within a proposed category would receive the penalty amount associated to that category. Examples of certain violations in air, water and waste media have been provided in the Standard Penalty Table attached after Penalty Policy Issue 12. This illustrates violations that would fall within each category. Where it is appropriate to include more than more than one count for a violation type, the type of count suggested is noted. It is recommended that the proposed penalty for each category is not factored against a unit of time, as respondents may be adversely affected depending on the date the investigator conducts the investigation or the enforcement screening date.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Implementation of mandatory minimum penalties can be accomplished through the process of promulgating the Penalty Policy in rule at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.
Other Alternatives	

Notes	The subcommittee reviewed the TxPIRG report issued in May 2004 entitled <i>Mandatory Minimum Penalties, An Effective Tool For Enforcement of Clean Water Laws</i> . The subcommittee concluded that even though the report does not mention Texas, the TCEQ in concept already agreed with the conclusions by creating mandatory minimum penalties in the current penalty policy in the penalty matrices for major harm.
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Penalty Policy Subcommittee	
Issue Priority.	8
Key Issue	<u>Partial credit for corrective actions:</u> Should a partial good faith adjustment in a penalty calculation be allowed based on completion of some but not all required corrective actions?
	<u>Basis:</u> Commissioner Input, Public Comment, Staff Input and Review of Current Policy.
Other Subcommittees Reviewing Issue	
Recommendation	<p>It is recommended that TCEQ change the current Penalty Policy to allow credit for partial corrective actions. Under the current policy, no partial credit is given for good faith effort to comply unless all of the violations are completely resolved.</p> <p>For example, allow an entity with ten violations which corrects six violations prior to an NOE credit for the six corrected violations rather than no credit because all violations were not completely resolved. However, the act of ordering equipment to come into compliance would not be considered correcting a violation.</p> <p>Include a caveat to exclude partial good faith reductions in cases involving culpability, repeat violators and where no capital outlay is involved.</p> <p>This recommendation could be implemented by revisions to the Penalty calculation Worksheet (PCW). The current table on the summary page would be replaced with a new table used to evaluate each violation. If compliance has been achieved before the NOV/NOE is issued, the EC will recommend a 30% reduction on the violation. If compliance was achieved after the NOV/NOE, the EC will then recommend a 20% reduction.</p>

	<p>The Enforcement Coordinator would explain the type of corrective action that the respondent took and when the corrective action was taken. For example: “Respondent achieved compliance on <i>Date</i>. Specifically, the respondent has....”. Or: “Respondent has taken the necessary steps to come into compliance. Specifically, the respondent has....”. If the respondent is not in compliance and has taken no steps to do so, the EC will simply state: “There is no documentation that the respondent has taken steps to come into compliance.”</p> <p>This new method would not give good faith effort credit for one time violations without the opportunity to comply. Such violations include but are not limited to the installation of a system at a site where either the installer or the system was not permitted or authorized at the time or where fuel was delivered and deposited into a UST system with no delivery certificate at the time.</p>
	<p><u>Basis:</u> Advantages of Recommended Good Faith Effort Procedure:</p> <ul style="list-style-type: none"> • makes the calculation of GFE simpler for ECs • removes the ‘extraordinary’ and ‘ordinary’ Quality criteria. Instead, the EC will only determine if the respondent is either completely in compliance or has taken steps to do so • still gives credit based on timeliness, i.e Before NOV/NOE and after NOV/NOE • takes into consideration respondents who may not fully be in compliance but have addressed some of the identified violations
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Allowing partial credit for corrective actions can be accomplished through the process of promulgating the Penalty Policy in rule at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.
Other Alternatives	

Penalty Policy Subcommittee	
Issue Priority.	9
Key Issue	<u>Use of deferrals in case settlements:</u> A) Should deferrals continue to be offered and if so, in what situations? B) Are expedited settlements or an expedited deferral appropriate when the penalty calculation includes an upward adjustment due to culpability?
	<u>Basis:</u> Commissioner Input, Public Comment and State Auditor's Report.
Other Subcommittees Reviewing Issue	Enforcement Process
Recommendation	Eliminate granting penalty deferrals.
	<u>Basis:</u> Deferrals do not necessarily speed up settlement under current practice where a respondent has 60 days (after a proposed order is sent) to sign the order in exchange for a 20% deferral. This is a practice, but not addressed in the current Penalty Policy. Respondents take deferrals in about one-half of the cases in which deferrals are offered.
	<u>Implementation Impacts:</u> • Since deferrals are not written in the current Penalty Policy but rather are offered as a matter of agency practice, no implementation is required for eliminating deferrals.
Other Alternatives	Expressly provide in the Penalty Policy that deferrals are an option in every case, including those involving culpability. The current Penalty Policy only includes deferrals for first time offenders and precludes deferrals in situations involving culpability.
Notes	The Enforcement Process Subcommittee is considering ways to shorten the time it takes for an enforcement action, and has related recommendations to provide monetary incentives in return for expedited agreement to the order and penalties. May slightly increase revenue to the state's General Revenue Fund.

Penalty Policy Subcommittee	
Issue Priority.	10
Key Issue	<u>Penalties in default orders:</u> In a penalty calculation included in a default order against a respondent, should penalties be increased?
	<u>Basis:</u> Commissioner Input and Public Comment

Other Subcommittees Reviewing Issue	Enforcement Process
Recommendation	<p>Yes, additional penalties should be included in default orders. Additional penalties should be assessed in two circumstances:</p> <p>1) an instance of cases when a respondent does not reply to the enforcement petition (“no answer default orders”); and</p> <p>2) an instance when the respondent answers the petition requesting a hearing but then does not show up when the preliminary or evidentiary hearing on the matter is convened by SOAH (“answer default orders”).</p> <p>Implications:</p> <ul style="list-style-type: none"> • encourages Attorney General to pursue higher penalties from higher default orders • knowledge of the policy change and renewed agency efforts to collect past due penalties may result in less default orders <p>To avoid recalculating a penalty prior to Agenda setting, and because of notice issues, it may be necessary to include in the petition a caveat that if the respondent fails to answer, then the penalty is automatically increased and entered as a default. . A similar warning could also be provided in correspondence associated with setting a hearing.</p> <p><u>Basis:</u> Currently, penalties in very few default orders are ever collected. Concerns have been raised regarding the expenditure of TCEQ and SOAH resources to provide the hearing opportunity to respondents who do not act in good faith or may seek to obstruct the process provided by the state. This recommendation provides further deterrence in the enforcement process.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Increasing penalties in default orders can be accomplished through the process of promulgating the Penalty Policy in rule at the conclusion of the enforcement review. • Proposed orders mailed to respondents will need to be changed to account for a higher penalty in cases where a default is entered as opposed to when the respondent answers the Notice of Enforcement. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.
Other Alternatives	

Notes	The Collections Subcommittee provides recommendations for use of collection agencies to collect delinquent fees and penalties owed to the State.
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Penalty Policy Subcommittee	
Issue Priority.	11
Key Issue	<u>Cases with low penalty amounts:</u> Should TCEQ decline to pursue a penalty in enforcement cases where agency resources could be better applied elsewhere, for example in cases with a de minimis fine?
	<u>Basis:</u> Commissioner Input and Public Comment
Other Subcommittees Reviewing Issue	
Recommendation	It is recommended that existing policy remain in place and no changes are recommended.
	<u>Basis:</u> <ul style="list-style-type: none"> • mandatory minimum may be required in certain cases • the agency has in the past issued orders with no penalty, only corrective action, and currently has the discretion to do so under current policy and practice
	<u>Implementation Impacts:</u> N/A
Other Alternatives	

Penalty Policy Subcommittee	
Issue Priority.	12
Key Issue	<u>PST certification and fuel distribution violations:</u> Should the Penalty Policy make special provisions for petroleum storage tank (PST) certification and fuel distribution violations, including guidance on whether and to what extent both the owner and operator are responsible?
	<u>Basis:</u> Commissioner Input, Public Comment, Staff Input and Review of Current Policy.
Other Subcommittees Reviewing Issue	

Recommendation	<p>Clarify through rulemaking the current commission practice regarding the legal ability and current policy of imposing joint and several liability for different respondents responsible for the same violation. This recommendation is closely related to Key Issue No. 5 regarding promulgating the Penalty Policy in rule.</p> <p><u>Implications:</u></p> <ul style="list-style-type: none"> • provides clear direction to Administrative Law Judges and results in consistent PFDs • provides clear Commission policy to give respondents notice of the basis upon which agency decisions are made <p><u>Basis:</u> Current commission practice is to utilize one penalty calculation worksheet for each violation and impose joint and several liability in cases where there is a relationship among respondents, such as a familial or business relationship. Under joint and several liability, one penalty for a violation is imposed, and every person responsible for the violation is liable for full payment of the penalty, although the liability is extinguished for all parties when the full penalty amount is paid.</p> <p>Recent PFDs have not always been consistent in whether the agency possesses the ability to impose joint and several liability, or alternatively, the PFD recommendations do not consistently impose joint and several liability.</p> <p>Joint and several liability is not addressed in either the penalty policy or in guidance. The Commissioners rely on practice, which is currently to impose joint and several liability based on authority from 7.051, Water Code, which allows an administrative penalty against a responsible “person.”</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Providing for more standard penalties for PST violations and clarifying joint and severable liability for respondents can be accomplished through the process of promulgating the Penalty Policy in rule at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.
Other Alternatives	
Notes	<p>It is important to note that joint and several liability for administrative penalties and joint and several liability for corrective action are separate and distinct parts of some PFDs and enforcement actions.</p>

Penalty Policy Issue 2 Attachment A

State Penalty Policies - Comparison of Economic Benefit Components									
State	Delayed Capital Costs	Delayed One-Time Expenditures	Avoided Periodic Costs	Competitive Advantage	Interest	Profit	De Minimis Benefits	Compelling Public Interest	Litigation Practicalities
Texas	X	X	X	1	1		2	2	2
New York	X	X	X			X	X	X	X
New Jersey	X	X	X	X	X	X	3	3	3
Florida	X	X	X		X	X			
California	X	X	X	X	X ⁴		X		
EPA-BEN Model	X	X	X	X			X	X	X

Note: Non-bolded columns headers indicate benefits of settlement.

¹ Considered in determination of whether a respondent has gained an economic benefit.

² In Texas, may be included in “Other factors as justice may require.” In New Jersey, could be included in “Any other benefits resulting from the violation.”

³ May be considered as part of “any other factors relevant to economic benefit.”

⁴ California’s “Interest Factor”, also referred to as Interest Rate, allows the violator to benefit by:

(1) earning interest on the funds that should have been spent on compliance,

(2) increasing profits by investing the funds back into the business, and

(3) avoiding the expense of interest, if the business would have had to obtain a loan to pay the cost of compliance. The “interest factor” may be a consolidation of multiple interest rates where the interest rate changed during the period of violation.

Texas:

Economic benefit is defined as monetary gain derived from a failure to comply with TCEQ rules or regulations. Economic benefit may include any or all of the following:

- (1) the return a respondent can earn by delaying the capital costs of pollution control equipment;
- (2) the return a respondent can earn by delaying a one-time non-depreciable expenditure; and
- (3) the return a respondent can earn by avoiding periodic costs.

Benefits from *delayed costs* potentially arise when a violator delays expenditures necessary to achieve compliance. *Avoided costs* are expenses that a violator would have incurred if the facility had complied with environmental regulations on time, and which can never be made up. To determine whether a respondent has gained an economic benefit (during the alleged violation period), staff must evaluate the following issues for each violation:

1. Did the respondent avoid or delay capital outlay for item(s) specifically required by a permit or rule that is applicable to the facility or unit in question?
2. Did the respondent gain any interest by avoiding or delaying capital outlay for item(s) specifically required by a permit or rule that is applicable to the facility or unit in question?
3. Did the respondent gain an economic advantage over its competitors?
4. Did the respondent avoid or delay disposal, maintenance, and/or operating costs?
5. Did the respondent receive increased revenue due to noncompliance?
6. Did the respondent avoid the purchase of financial assurance for item(s) specifically required by a permit or rule that is applicable to the facility or unit in question?

If the answer is “yes” to any of these questions, then staff will estimate the overall economic benefit gained. Only capital expenditures, one-time nondepreciable expenditures, periodic costs, and interest gained will be evaluated in the calculation of economic benefit.

Once the economic benefit has been estimated and totaled for all violations included in the enforcement actions, it should be compared to the following criteria, and the penalty amount will be increased accordingly. The economic adjustment factor will be capped so the adjustment amount does not exceed the economic benefit gained.

Economic Benefit Matrix

% Adjustment	Dollar Range of Benefit
None	Less than \$15,000
50%	Equal to or greater than \$15,000

Other factors that justice may require: The staff may recommend adjustment of the penalty amount, on a case-by-case basis, upon a consideration of factors unique to the situation. This adjustment may result in an increase or decrease of the penalty amount. The current penalty policy does not expressly limit which factors may result in an increase or decrease.

New York:

The benefit component is an estimate of the economic benefit of delayed compliance, including the present value of avoided capital and operating costs and permanently avoided costs which would have been expended if compliance had occurred when required. The benefit component should also include any other economic benefits resulting from noncompliance, such as avoided liquidated damages under contracts and enhanced value of business or real property. In appropriate cases, the DEC may use the EPA computer program known as BEN to calculate and estimate the economic benefit of sophisticated and significant violations.

There are three cases where adjustments may be appropriate. The DEC in its discretion may refuse to consider these benefit component adjustments if the respondent does not supply sufficient and credible documentation of the relevant matter.

- 1) De Minimis Benefits - The commitment of significant DEC resources may not be warranted in cases where the magnitude of the benefit component is insignificant. In such matters, DEC enforcement staff has the professional discretion not to seek the benefit component of the penalty.
- 2) Compelling Public Interest - In the exercise of discretion, the DEC attorney, in consultation with Regional and/or Program Directors, may reduce or suspend payment of the benefit component of the penalty where the public interest would not be served by taking the penalty action to full adjudicatory hearing. In such cases, it may be necessary to settle the case for less than the benefit component. Such settlements may be appropriate in the following circumstances: removal of the economic benefit would result in plant closure, bankruptcy, or other extreme financial burdens, and there is public interest in allowing the firm to continue in business; in enforcement actions against not-for-profit public entities such as municipalities, the circumstances might include situations where assessment of the civil penalty threatens to disrupt continued provision of essential public services. In situations where a plant is likely to close anyway, or where there is a likelihood of continued harmful non-compliance, the full economic benefit should be recovered.
- 3) Litigation Practicalities - The exercise of prosecutorial discretion by the Department's professional staff is a critical component of this Policy and is to be applied in all cases to determine a proper resolution.

The ability to pay is also considered as one of the adjustments to gravity component of penalty determinations, as well "unique factors" or factors not anticipated in existing penalty guidance.

New Jersey:

For water quality and certain hazardous substances, economic benefit shall include:

1. The amount of savings realized from *avoided* capital or noncapital costs resulting from the violation;
2. The return earned or that may be earned on the amount of the *avoided* costs;
3. Any benefits accruing to the violator as a result of a *competitive market advantage* enjoyed by reason of the violation; and
4. Any other benefits resulting from the violation.

The Department shall consider the following factors in determining economic benefit:

- The amount of *capital* investments required, and whether they are one-time or recurring
- The amount of one-time *nondepreciable* expenditures;
- The amount of annual expenses;
- The useful life of capital;
- Applicable tax, inflation and discount rates;
- The amount of low *interest* financing, the low interest rate, and the corporate debt rate; and,
- Any other factors relevant to economic benefit.

If the total economic benefit was derived from more than one violation, the total economic benefit may be apportioned to an amount no greater than \$50,000 per violation. However, for the Air Enforcement Program, the Department may, in addition to any other civil administrative penalty assessed pursuant to this subchapter, include as a civil administrative penalty the economic benefit (in dollars) which the violator has realized as a result of not complying with or by delaying compliance with the requirements of the Act, or any rule, administrative order, operating certificate or permit issued pursuant thereto.

For Solid and Hazardous Waste Programs, the Department may, in addition to any other civil administrative penalty assessed pursuant to this subchapter, includes as a civil administrative penalty the economic benefit (in dollars) which the violator has realized as a result of not complying with or by delaying compliance with the requirements of the Act, or any rule promulgated, any administrative order, permit, license or other operating authority issued, or any Part A permit application filed, pursuant to the Act. *If the total economic benefit was derived from more than one violation*, the total economic benefit may be apportioned among the violations from which it was derived so as to increase each civil administrative penalty assessment to an amount no greater than \$50,000 per violation.

Florida:

Florida distinguishes between *passive* and *active* economic benefits. Passive economic benefits usually consist of the money that was made or that could have been made by an alternate use of the money that should have been expended to bring the facility into compliance. Active economic benefits usually consist of any increase in profits or reduction in costs that are directly attributable to the activity conducted in violation of Department statutes or rules.

Florida uses the EPA Civil Penalty Policy approach historically (the Ben Model), as per the 1990 and now the revised 2003 Civil Penalty Policy. The lower limit for consideration was \$2,500 and now that is \$3000. Florida's Environmental Litigation Reform Act (ELRA), enacted in the 2001 legislative session, sets specific penalty amounts for certain violators covered under the Act when those violations are pursued with a Notice of Violation. Independent of ELRA, the Department has statutory authority to assess administrative penalties in Beaches and Coastal Systems, RCRA, UIC, asbestos cases and State Lands cases for up to \$10,000 per day. Penalty guidelines for these programs have been adopted by rule.

For non-ELRA cases, the statute provides that a penalty should be calculated in an amount sufficient to ensure future compliance. It is therefore the Department's policy to ensure future compliance by eliminating as much of the economic benefits of non-compliance as the statute will allow by adding the economic benefits of non-compliance, where appropriate and practical, to all civil penalty calculations.

Two other economic benefit considerations are 'ability to pay', which may be used to decrease the amount of penalties derived from the ERLA schedule, and 'other unique factors', which is intended to provide the District (i.e., Regional Office) with the flexibility to make adjustments in a particular case based upon unique circumstances that do not clearly fit within the other adjustment factors.

California:

The only California environmental law that specifically requires the recovery of economic benefit is in the Water Code:

"In determining the amount of any liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, *economic benefit or savings*, if any, from the violation, and other matters that justice may require. *At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.*

Also, California's Department of Toxic Substances Control, Hazardous Waste Management Program, has developed a guidance document entitled Guidelines for Calculating the Economic Benefit of Noncompliance. This document is based on regulations which require that "a violator should not benefit economically from noncompliance, either by avoiding or delaying costs or gaining a competitive advantage". Administrative penalties include the amount of any economic benefit gained or cost of compliance avoided by the violator as a result of noncompliance, up to the statutory maximum for each violation. Economic benefit includes, but is not limited to, avoided costs, increased profits or avoided interest. Economic benefit also includes the use of capital from delayed or avoided costs.

EPA-BEN Model :

This model identifies two types of economic benefit from noncompliance in determining the economic benefit component - benefit from delayed costs, and benefit from avoided costs. Since 1984, it has been Agency policy to use either the BEN computer model or “the rule of thumb” approach to calculate the economic benefit of noncompliance. The rule of thumb approach is a straightforward method to calculate economic savings from delayed and avoided compliance expenditures. Enforcement personnel may use the rule of thumb approach whenever the economic benefit penalty is not substantial (generally under \$10,000) and use of an expert financial witness may not be warranted.

For economic benefit penalties that are more substantial (generally more than \$10,000), enforcement personnel should use the BEN model to calculate noncompliance economic benefits. The primary purpose of the BEN model is to calculate economic savings for settlement purposes. The model can perform a calculation of economic benefit from delayed or avoided costs based on data inputs, including inputs that consist of optional data items and standard values already contained in the program.

This model indicates that for certain (RCRA) requirements, the economic benefit of noncompliance may be relatively insignificant (e.g., failure to submit a report on time). In the interest of simplifying and expediting an enforcement action, enforcement personnel may forego the inclusion of the benefit component, where it appears that the amount of the component is likely to be less than the applicable amount shown in the chart below for all violations alleged in the complaint.

When the penalty is gravity-based and multi-day, total penalty is:	Economic benefits of noncompliance should be pursued if it totals:
\$30,000 or less	at least \$,3000
\$30,001 to \$499,999	at least 10% of the proposed penalty
\$50,000 or more	\$5,000 or more

Penalty Policy Issue 7 Attachment A

Standard Penalty Table

Category	Example violations
Falsification 100%	Falsification data or other information in order to deceive agency or public.
Registration, Reporting, Certifications, and Notification 10%	<p>Failure to submit required reports, deed recordation, certifications and notifications to the agency and others. Failure to register or accurately register equipment, sites, etc. as required by the agency.</p> <p>Air Failure to submit Title V certification or emissions event notice Failure to submit deviation reports Failure to submit emissions inventory Failure to submit federal notice of compliance reports or compliance banking report not submitted Failure to submit sample results Failure to submit complete or inaccurate report Failure to report deviations on Title V certification Failure to provide all elements on emissions event report</p> <p>Water Failure to submit engineering and financial planning for 75/90 capacity Failure to report exceedances that are greater than 40% of permit limit Failure to submit required monthly, quarterly, and annual reports, accurate reports, or complete reports Failure to notify media when reporting a bypass Failure to submit discharge monitoring report (DMR), accurate DMR, or complete DMR Failure to correctly report flow and effluent parameters Failure to provide noncompliance report (oral or written) Failure to provide notification on alterations where no permit is required Failure to submit pollution prevention plan Failure to submit plans and specs and obtain approval prior to construction of a public water supply Failure to provide required public notification Failure to submit well completion data to public drinking water program Failure to obtain new maintenance contract for on-site sewage facilities (OSSF) Failure to submit site evaluation with planning materials in OSSF Failure to notify permitting authority of the date construction is to begin in OSSF Failure to request all required inspections in OSSF Failure to notify agency of any sensitive features encountered during construction in Edwards Aquifer Failure to obtain required registration Failure to submit Notice of Intent (NOI) Failure to correct inaccurate information on NOI Failure to renew pretreatment agreement Failure to obtain a certificate of convenience and necessity Failure to file an approved tariff with the agency Failure to file a sanitary control easement</p>

Standard Penalty Table

	<p>Waste</p> <p>Failure to submit annual waste summaries.</p> <p>Failure to provide required notification of confirmation sampling events to region offices.</p> <p>Failure to provide notice to affected property owners for Affected Property Assessment Reports.</p> <p>Failure to provide construction notification of PSTs</p> <p>Failure to report required releases and spills to the agency.</p> <p>Failure to provide required written notification of Stage II system installation or testing.</p> <p>Failure to obtain an EPA ID number</p> <p>Failure to notify of one or more waste streams, waste management units or other incomplete or inaccurate information for the Notice of Registration</p> <p>Failure to register existing, new or removed PSTs.</p> <p>Failure to update changes or additional information to the PST registration</p> <p>Failure to fully and accurately complete the PST registration and self certification forms</p> <p>Failure to register used oil or tire recycling activities.</p> <p>Failure to submit required certification of compliance with order provisions.</p> <p>Failure to certify completion of closure or post closure care.</p> <p>Failure to have PST installation certifications.</p> <p>Failure to complete deed recordation or deed certification in county deed records for contaminated areas.</p>
<p>Record Keeping 10%</p>	<p>Failure to keep records or fail to have complete, accurate or available records on site.</p> <p>Air</p> <p>Failure to maintain calibration logs or monitoring logs</p> <p>Failure to include all components on master component list</p> <p>Failure to maintain non-reportable emissions events log</p> <p>Failure to record CEMs data, temperatures, feed rates, coating and solvent usage</p> <p>Failure to record opacity readings in daily flare log</p> <p>Water</p> <p>Failure to adequately maintain records (includes no records and incomplete records)</p> <p>Failure to provide records of DMRs during investigation</p> <p>Failure to maintain registrations and authorizations on-site or in required vehicles</p> <p>Failure to provide inventory of all industrial users</p> <p>Failure to maintain up-to-date map of the public water system</p> <p>Waste</p> <p>Failure to maintain an adequate operating record</p> <p>Failure to maintain records of inspections, manifests or ground water analysis or waste analysis.</p> <p>Failure to maintain records related to the PST systems such as inventory control, registration, installation records, testing records, maintenance and service records, site assessment records etc.</p> <p>Failure to maintain a copy of the CARB order, testing and maintenance records.</p> <p>Failure to maintain required records of the number of lead acid batteries purchased and accepted, returned etc.</p> <p>Failure to maintain required logs at scrap tire storage facilities.</p> <p>Failure to maintain required inspection records at MSW landfill.</p>
<p>Labeling 5%</p>	<p>Failure to label or or properly label equipment, units, containers, tanks etc.</p> <p>Air</p> <p>Failure to label Emission Points with EPN</p> <p>Failure to tag all LDAR components (valve, pump, etc.) in a unit</p>

Standard Penalty Table

	Water Failure to mark and identify all pump trucks for sludge transporters Failure to label tanks in storm water program Failure to mark all discharge valves and ports for sludge transporters Failure to place authorization stickers on motor vehicles Failure to properly label chemical tanks Failure to properly identify pipes
	Waste Failure to label a less than 90 day container or tank with the words “hazardous waste” or without the beginning date of accumulation Failure to ensure that a tag, label or marking is applied to top of fill tube of each UST. Failure to post operating instruction on each dispenser equipped with a Stage II system.
Manifests Shipping Papers and Trip Tickets 10%	Failure to use or maintain manifests, shipping papers or trip tickets as required.
	Air N/A
	Water Failure to use trip tickets when transporting sludge waste Failure to adequately complete trip ticket for sludge transports
	Waste Failure to use or properly complete manifest or shipping papers, i.e. missing or incomplete information on manifests. Failure to return signed copies of manifest (for receiving facilities) Failure to maintain required manifests or shipping paper for waste shipments for remediation related activities. Failure to use and maintain bill of ladens for shipments of used oil filters and manifests for scrap tires.
Permit/Licensing 25%	Failure to apply for permit or license, renewal or amendment; operating without a permit or license
	Air Failure to operate with a permit when a permit is required Failure to renew expired permit when required Failure to obtain a permit amendment for plant modifications Failure to update Title V Permit when requirements change
	Water Failure to obtain a permit for a new facility Failure to renew expired permit and continued to operate Failure to obtain a permit amendment for a modification Failure to obtain a permit to discharge filter backwash water Failure to obtain authorization prior to beginning construction of an OSSF Failure to possess current OSSF installer license Failure to obtain documentation that owner or agent has permitting authority’s permission to construct OSSF Failure to submit Edwards Aquifer protection plan or contributing zone plan and receive ED approval Failure to obtain irrigator and/or installer license

Standard Penalty Table

	<p>Waste</p> <p>Failure to obtain a permit or authorization prior to treatment or disposal of a hazardous waste on-site or extended or long term storage of hazardous waste.</p> <p>Failure to obtain a permit or other authorization for the acceptance of industrial and/or hazardous waste from off-site source.</p> <p>Failure to submit permit modifications to transfer hazardous waste permit to new owner at least 90 days prior to scheduled change.</p> <p>Failure to ship waste to a permitted or authorized facility.</p>
<p>Quality Control/Analyses 25%</p>	<p>Failure to follow required procedures and testing that ensure a safe product for employees, the public and the environment.</p> <p>Air</p> <p>Failure to conduct sampling on cooling towers or fuel gas</p> <p>Failure to perform required vehicle emissions test, stack test, performance test</p> <p>Failure to calibrate or test the calibration of an instrument</p> <p>Failure to monitor temperatures</p> <p>Failure to conduct opacity readings</p> <p>Failure to have a monitoring system in place to record emissions or provide data to calculate emissions</p> <p>Failure to calculate emissions</p> <p>Water</p> <p>Failure to test, inspect, stormwater sewer systems for non stormwater flows</p> <p>Failure to monitor flow, disinfectant residuals</p> <p>Failure to conduct quarterly visual monitoring of stormwater discharge</p> <p>Failure to collect samples</p> <p>Failure to use industry accepted standards to obtain adequate measurements</p> <p>Failure to calibrate flow-measuring device, pH meter, chlorine meter, etc.</p> <p>Failure to follow appropriate analytical procedures and monitoring plans</p> <p>Waste</p> <p>Failure to complete hazardous waste determination or waste classification.</p> <p>Failure to complete required analysis and classification for land disposal restrictions.</p> <p>Failure to follow ground water sampling and analysis plan.</p> <p>Failure to conduct required tank or line tightness testing</p> <p>Failure to conduct required testing of cathodic protection equipment</p> <p>Failure to complete adequate statistical inventory reconciliation (SIR)</p> <p>Failure to prepare a waste analysis plan.</p> <p>Failure to conduct proper or adequate analysis of ground water samples in accordance with ground water sampling and analysis plan.</p> <p>Failure to conduct integrity assessments for hazardous waste tanks.</p>
<p>General Preventative Maintenance/Housekeeping 5%</p>	<p>Failure to maintain conditions generally required by permit or rule which if followed or completed could avoid or prevent more serious violations.</p> <p>Air</p> <p>Open containers, non-chemical spills</p> <p>Water</p> <p>Rusted catwalks</p> <p>Climbing vegetation on electric panel</p> <p>Debris and trash around stabilization pond</p>

Standard Penalty Table

	<p>Waste</p> <p>Failure to maintain drums of industrial non hazardous waste closed with lids or in good condition, ie. (rusting dented etc.)</p> <p>General Prohibition (30 TAC 335.4) conditions which are not actual releases.</p> <p>Failure to maintain adequate aisle space for industrial non hazardous waste drums</p> <p>Failure to maintain adequate freeboard in an industrial non hazardous waste surface impoundment.</p> <p>Failure to prevent erosion condition on a cover or slope for an industrial non hazardous waste landfill.</p>
<p>Operations and Maintenance</p> <p>25%</p>	<p>Failure to follow required operating procedures and methods that protect human health and the environment from pollution exposure.</p> <p>Air</p> <p>Failure to maintain vehicle emission control devices or altering, bypassing vehicle emission control devices</p> <p>Failure to maintain car-seal valves</p> <p>Failure to repair tears in baghouse bags</p> <p>Failure to maintain electrical grounding</p> <p>Failure to meet stack height requirements</p> <p>Operating a flare without a pilot flame</p> <p>Exceeding limit rates for temperature, firing rate, pumping rate, usage rate, production limits, destruction efficiency</p> <p>Failure to comply with manufacturer specifications or permit specifications</p> <p>Failure to provide spare compressor</p>

Standard Penalty Table

	<p>Water</p> <p>Failure to properly cover bar screens</p> <p>Failure to provide self-contained breathing apparatus at treatment plant</p> <p>Failure to properly house chlorination facilities/ improper ventilation of chlorine facilities</p> <p>Failure provide backflow prevention device</p> <p>Failure to prevent livestock from grazing within lagoon system</p> <p>Failure to provide liftstation with alarm</p> <p>Failure to maintain 2-foot freeboard</p> <p>Failure to properly waste sludge from Imhoff tank</p> <p>Failure to properly maintain treatment units (clarifiers, chlorine contact chambers, sludge digesters, etc.)</p> <p>Failure to comply with design, construction, and/or maintenance requirements for clear wells, stand pipes, pressure tanks, elevated tanks, clarifiers, pumps, and other treatment units or appurtenances</p> <p>Inadequate water line size or placement</p> <p>Water plant being operated by unlicensed operator or operator with inadequate license</p> <p>Failure to plug abandoned wells</p> <p>Failure to provide adequate disinfection equipment or chemicals</p> <p>Failure to provide all-weather access road</p> <p>Failure to maintain adequate disinfectant residuals, turbidity levels</p> <p>Failure to complete customer service inspections</p> <p>Failure to maintain liner in lagoons at CAFO</p> <p>Failure to maintain manure stock piles at CAFO to prevent run-off</p> <p>Failure to provide facilities to prevent runoff of wastewater or stormwater at CAFO</p> <p>Failure to maintain sight gauges on sludge truck</p> <p>Failure to stop construction of an OSSF when planning material or soil conditions make compliance impossible</p> <p>Failure to meet minimum specifications of OSSF installation</p> <p>Failure to construct OSSF authorized for specific location in site evaluation</p> <p>Failure to maintain required separation distances in OSSF</p> <p>Failure to meet minimum standards for design and installation of irrigation systems</p> <p>Failure to comply with conditions of an Edwards Aquifer protection plan</p>
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Standard Penalty Table

	<p>Waste</p> <p>Failure to ship hazardous waste off-site within 90 days or 180 days for a small quantity generator.</p> <p>Exceedance of storage time limit for universal waste rules, (generators, handlers etc.)</p> <p>Exceedance of time allowed to perform closure or to close.</p> <p>Exceeding the allowable volume or number of containers in a permitted hazardous waste container storage area.</p> <p>Failure to complete inspect hazardous waste facility for malfunctions, deterioration, operator errors and discharges.</p> <p>Failure to have an adequate inspection schedule with required information for hazardous waste facilities</p> <p>Failure to conduct inspection on hazardous waste units, ie. tanks, container storage areas, landfills, ground water systems, etc.</p> <p>Failure to take adequate precautions for ignitable, reactive or incompatible wastes</p> <p>Failure to maintain an adequate ground water monitoring system.</p> <p>Failure to follow closure plan or post closure care plan</p> <p>Failure to keep hazardous waste drums closed with lids,</p> <p>Failure to maintain containers of hazardous waste in good condition.</p> <p>Failure to maintain adequate freeboard for hazardous waste surface impoundment.</p> <p>Failure to perform investigation and confirmation steps in response to suspected release</p> <p>Failure to properly remove from service a PST</p> <p>Failure to make available a valid current delivery certificate</p> <p>Failure to conduct inventory control or to conduct proper or adequate inventory control</p> <p>Failure to ensure that release detection, corrosion protection and spill and overfill equipment is properly maintained and operated properly</p> <p>Failure to conduct required inspections on PST systems including cathodic protection equipment.</p> <p>Failure to maintain and properly operate Stage II components ie. torn or damaged nozzle boots, etc.</p> <p>Failure to conduct required inspections of the Stage II vapor recovery system.</p> <p>Failure to comply with training requirements for personnel involved with the Stage II systems.</p> <p>Failure to maintain required height and size requirements at scrap tire sites.</p> <p>Failure of a MSW landfill to follow closure and post closure care requirements.</p> <p>Failure to maintain proper cover requirements for MSW landfill.</p> <p>Failure to control windblown waste and litter.</p> <p>Failure to follow site operating plan.</p> <p>Failure to have an adequate personnel training program for hazardous waste sites.</p>
<p>Security/ Emergency Preparedness 25%</p>	<p>Failure to plan for fires, releases, emergencies, natural disasters, terrorist attacks, or other catastrophes by not using required contingency plans or other required planning documents.</p> <p>Air</p> <p>Failure to provide backup generator for major events or electrical failures</p> <p>Failure to provide emissions reduction plan</p> <p>Water</p> <p>Failure to provide lockable gates</p> <p>Failure to provide adequate intruder resistant fence</p> <p>Failure to provide backup generator for electrical failure</p>

Standard Penalty Table

	<p>Waste</p> <p>Failure to prepare an adequate contingency plan.</p> <p>Failure to have a 24 hour surveillance system which monitors and controls entry to the active portion the of the facility.</p> <p>Failure to have a fence or natural barrier which completely surrounds the active portion of the facility;</p> <p>Failure to have a means to control entry at all times through gates, or other entrances.</p> <p>Failure to have a sign with the legend “Danger Unauthorized Personnel Keep Out.”</p> <p>Failure to have required emergency equipment i.e., alarms, fire extinguishers, fire control equipment, decontamination equipment, water at adequate pressure and volume.</p> <p>Failure to have required aisle space.</p> <p>Failure to make arrangements with local authorities.</p> <p>Failure to have an emergency coordinator.</p> <p>Failure to prepare Fire Protection Plan for MSW landfill</p>
<p>Construction, Capacity and Design requirements 25%</p>	<p>Failure to meet capacity, construction, and design requirements.</p>
	<p>Air</p> <p>N/A</p>
	<p>Water</p> <p>Failure to provide adequate raw water pump capacity</p> <p>Failure to provide adequate water pressure throughout distribution system</p> <p>Failure to provide adequate treatment plant capacity</p>
	<p>Waste</p> <p>Failure to meet the design and construction requirement for landfills, drip pads, containment buildings, munitions and Explosive Storage, or tanks.</p> <p>Failure to have adequate secondary containment for hazardous waste tank.</p> <p>Failure to meet location standards for hazardous waste management units.</p> <p>Failure to install or construct required secondary containment for used oil handler facilities.</p> <p>Failure to install or properly construct required leachate collection and liners.</p> <p>Failure to meet location restrictions requirements for MSW landfill.</p> <p>Failure of MSW landfill to have required ground water monitoring system.</p> <p>Failure to install or properly install all components of a required Stage II system</p>
<p>Water Rights 25%</p>	<p>Violations that concern state water rights.</p>
	<p>Water Rights</p> <p>Diverting, taking, or storing water without a water right</p> <p>Diverting, taking, or storing water above the authorized amount</p> <p>Diverting above the authorized diversion rate</p> <p>Diverting water for a use not specified in the water right</p> <p>Diversion in excess of an authorization to divert, granted by a water master</p>

Financial Assurance and Penalty Payments 25%	Failure to provide required financial assurance or pay administrative penalties required by a prior order.
	Air Failure to pay administrative penalty from prior order.
	Water Failure to pay administrative penalty from prior order.
	Waste Failure to maintain financial assurance for closure or post closure for hazardous waste site. Failure to provide for financial assurance for sudden and not sudden liability for hazardous waste site. Failure to update closure and post-closure cost estimates for inflation or addition of new hazardous waste units. Failure to provide financial assurance for corrective action and for third party compensation for bodily injury or property damage caused by accidental releases for PSTs. Failure to provide required financial assurance for municipal waste sites including landfills, tire sites, and used oil sites and others.